In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1549

JOSEPH SCAPPATONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the goods he was convicted of possessing were not part of an interstate shipment when stolen and that the indictment was invalid because it did not specifically indicate the location at which the theft occurred.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner and a co-defendant were convicted of conspiring to possess (count 1) and possessing (count 2) two electron microscopes worth $120,000 which had been stolen from an interstate shipment, in violation of 18 U.S.C. 371 and 659. Petitioner was sentenced, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), to a term of 18 months' imprisonment on count 1 and one year's imprisonment on count 2; execution of the sentence on count 2 was suspended and petitioner was

placed on probation for a term of two years to commence upon completion of his imprisonment under count 1. The court of appeals affirmed without opinion (Pet. App.).

The evidence at trial revealed that on June 15 and 16, 1970, a truck driver for Philips Electronic Instruments of Mount Vernon, New York, picked up two unassembled electron microscopes at a foreign trade zone in Staten Island, New York, where they had been deposited after being shipped to the United States from the manufacturing plant in Holland (T. 28-30, 38). On the evening of June 16, 1970, the driver left the truck, with the two unassembled electron microscopes locked inside, parked in the driveway of the Philips Electronic Instruments property in Mount Vernon, New York, ready for an early departure for the deliveries in Massachusetts which he had been instructed to make the next day. In the cab of the truck were bills of lading and packing lists showing that one microscope was to be delivered to the Beth Israel Hospital in Boston and the other to the Marine Biological Laboratory in Woods Hole (T. 33-35). However, when he returned early the next morning to begin his trip to deliver the microscopes, the driver found that the truck had disappeared (T. 35).

In July 1970, petitioner's co-defendant, Perry Maurino, approached Carl French and told him that he had some "stuff" that they could make some money on but that he did not know what it was. Maurino showed French "a packing slip, or something to that facsimile, a piece of paper with a lot of number[s] on it" (T. 76-78). Maurino gave French the packing slip and told him that if he could find out what these goods were, French would share in the proceeds (T. 77). When French was unable to find out what the goods were— "one guy said it was Sonar equipment"—Maurino contacted Tony Dos Santos, who de-

termined that the goods were "electronic microscopes" (T. 78-79, 199). Maurino found the market for "electronic microscopes" rather limited (T. 79). He suggested that French find out whether or not a ransom could be obtained for the return of the microscopes (T. 80).

On Maurino's instructions, French and Dos Santos began negotiations with the insurance company. At one point, however, the insurance company insisted that it be given the serial numbers of the microscopes as a demonstration that French and Dos Santos actually had the microscopes (T. 81). Maurino then took French to petitioner's garage in the Bronx, where the microscopes were stored. There French met petitioner and the three men obtained the serial numbers from the microscopes (T. 81-82).

Additional negotiations resulted in an agreement with the insurance company that $12,000 would be paid for the return of the microscopes (T. 87). French and Maurino agreed to split the proceeds, with petitioner to share in Maurino's half (T. 88-89).

Pursuant to a schedule worked out with the insurance company, the microscopes were then delivered from petitioner's garage to the Philips warehouse in three loads. On each occasion petitioner assisted in loading the delivery truck (T. 90, 94, 97-98, 265-271). On each delivery, the truck was driven by William Karabinos, whose services had been obtained by French. After each delivery, Karabinos picked up a partial payment from the insurance company and returned it to French. After the second delivery, French paid a portion of the money to Maurino (T. 96). After the third delivery, petitioner complained that Maurino had given him nothing from the prior payment and French then paid him directly (T. 97-99).

Neither petitioner nor his co-defendant testified or presented any evidence.

1. Petitioner contends that when the electron microscopes were stolen they were not part of a shipment which was moving in interstate commerce. The evidence showed, however, that the microscopes had begun their movement in interstate commerce when they were picked up at Staten Island on June 15 and 16, 1970, and brought to Mount Vernon, from which they were to be transported to Boston and Woods Hole on June 17.

Even assuming that the shipment originated in Mount Vernon rather than Staten Island, the jury could properly find that the microscopes were part of an interstate shipment when they were stolen. They had been locked inside the truck that was to transport them to Massachusetts the following day. The driver had taken custody of the microscopes with instructions to deliver them to the Boston and Woods Hole addresses. He had been given the bills of lading and packing lists for the microscopes and had placed the documents on the truck's dashboard. He had parked the truck in the driveway of Philips Electronic Instruments pending his arrival the next morning to drive it to Massachusetts. See *United States* v. *Astolas*, 487 F. 2d 275 (C.A. 2), certiorari denied April 22, 1974 (Nos. 73-1057, 73-1058); *United States* v. *Parent*, 484 F. 2d 726 (C.A. 7), certiorari denied February 19, 1974 (No. 73-5622); *United States* v. *Yoppolo*, 435 F. 2d 625 (C.A. 6); *United States* v. *Thomas*, 396 F. 2d 310 (C.A. 2).

2. Petitioner also contends that the indictment was invalid because it did not "specifically indicate from where the alleged stolen items were actually taken" (Pet. 5). This issue was not raised in the court of appeals (nor, apparently, in the district court). "Only in exceptional cases will this Court review a question not raised in the

court below" (*Lawn* v. *United States*, 355 U.S. 339, 362, n. 16). There are no such exceptional circumstances in this case.

In any event, the indictment, a copy of which we are lodging with the Clerk, alleged each element of the offenses it charged and was sufficiently detailed to apprise petitioner of what he must be prepared to meet. See *Hagner* v. *United States*, 285 U.S. 427, 431; *Russell* v. *United States*, 369 U.S. 749, 763-764. If petitioner needed further information to prepare his defense, the appropriate course would have been to file a motion for a bill of particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure. See *United States* v. *Keine*, 424 F. 2d 39 (C.A. 10), certiorari denied, 400 U.S. 840; *United States* v. *Branan*, 457 F. 2d 1062 (C.A. 6); *United States* v. *Barbato*, 471 F. 2d 918, 921 (C.A. 1).

Contrary to petitioner's assertion, it was not necessary for the indictment to state the precise location from which the microscopes were stolen. *United States* v. *Manuszak*, 234 F. 2d 421 (C.A. 3), on which petitioner relies, holds only that the indictment must allege that the goods were stolen "from one of the specifically enumerated places or facilities" in 18 U.S.C. 659 (*id.* at 423). Among the facilities "specifically enumerated" in that section are motor trucks, platforms, and depots. The indictment in this case specified that the microscopes had been stolen from "motor trucks and from platforms and depots."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.